UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRENA FERRELL, Plaintiff, v. HOWARD UNIVERSITY, et al., Defendants.	Civil Action No. 98-1009 DAR

MEMORANDUM AND ORDER

I. INTRODUCTION

Pending for determination by the undersigned United States Magistrate Judge is Defendant Howard University's Motion to Dismiss or in the Alternative for Summary Judgment (Docket No. 25). Plaintiff Trena Ferrell brings this action pursuant to the Rehabilitation Act of 1973 ("the Rehabilitation Act"), 29 U.S.C. § 794 et seq., and the Americans with Disabilities Act ("the ADA"), 42 U.S.C. § 12101 et seq. As relief, plaintiff seeks to enjoin defendants from discriminating against her; an order requiring that she be reinstated in the College of Medicine; and compensatory as well as punitive damages. This case is before the undersigned for all purposes, including trial, pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.1.

II. BACKGROUND

Plaintiff, Trena Ferrell, enrolled in the Howard University College of Medicine in 1990. Compl. (Docket No. 1) at ¶ 4. After completing two years of coursework, Howard medical students are

required to pass Step 1 of the United States Medical Licensing Examination ("USMLE" or "the exam") in order to be promoted to their third year of medical school. The USMLE is administered by the National Board of Medical Examiners ("NBME"). However, students must be enrolled in medical school to sit for the USMLE. Howard's policy is to dismiss a student who fails the USMLE Step 1 exam three times, although the NBME allows students who are enrolled in medical school to sit for the exam six times. See Compl. at ¶ 8. After completing her first two years of coursework, plaintiff sat for the USMLE Step 1 but did not complete the exam. Compl. at ¶ 6. Plaintiff failed the exam on two subsequent occasions. Id. In August, 1995, the College of Medicine refused to "sponsor" plaintiff for further examinations, and dismissed her as a student. Plaintiff "then" sought medical intervention "to determine whether there was a physical or psychological explanation for her failures." Id.

In October, 1995 and October, 1996, plaintiff was diagnosed by a psychologist and a psychiatrist as having Attention Deficit Hyperactivity Disorder ("ADHD") and was prescribed medication. Compl. at ¶ 7. Plaintiff then advised Howard of her disability, and requested that the College of Medicine "sponsor" her for the licensing examination again with "appropriate accommodations for an individual with a disability." Compl. at ¶ 8. In December, 1996, Howard refused to grant plaintiff's request. Compl. at ¶ 9.

In January, 1997, plaintiff filed a complaint with the United States Department of Education, Office of Civil Rights, alleging that Howard University and its College of Medicine violated the ADA. Compl. at ¶ 10. On May 9, 1997, plaintiff filed a complaint with the District of Columbia Department of Human Rights and Minority Business Development, alleging that Howard University and its College of Medicine violated both the ADA and the Rehabilitation Act. Compl. at ¶ 10. On April 22, 1998,

plaintiff filed her complaint in this action (Docket No. 1).

On September 16, 1999, the defendants filed the instant Motion to Dismiss or in the Alternative Motion for Summary Judgment ("Defs.' Mot.")(Docket No. 25). Defendants have moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or alternatively, for summary judgment pursuant to Rule 56. As grounds therefore, defendants submit that the plaintiff fails to state a claim upon which relief can be granted under the ADA and the Rehabilitation Act because plaintiff failed to establish that she has a qualified disability, and that she petitioned the wrong entity for relief. See generally Defs.' Mot. Plaintiff, in her opposition, maintains that she has established that she has a qualified disability and that she has petitioned the correct entity because she must be in medical school in order to take the USMLE Step 1. See generally Pl.'s Resp. Defendants, in their reply, maintain that they have no obligation to accommodate a condition of which they had no notice. See generally Defs.' Reply.

Upon consideration of plaintiff's complaint, defendants' motion, and the memoranda in support thereof and in opposition thereto, plaintiff's complaint will be dismissed with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.[1]

III. LEGAL STANDARD

A motion to dismiss for failure to state a claim upon which relief can be granted does not test whether the plaintiff will prevail on the merits, but instead, whether the claimant has properly stated a

[1] The undersigned has excluded from its consideration all matters outside the pleading. See FED. R. CIV. P. 12(b).

claim. Price v. Crestar Sec. Corp., 44 F. Supp.2d 351, 353 (D.D.C. 1999)(citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). To prevail, a defendant must show "beyond doubt that the plaintiff can prove no set of facts in support of h[er] claim which would entitle h[er] to relief." E.E.O.C. v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997)(citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); see also Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Atchinson v. D.C., 73 F.3d 418, 421 (D.C. Cir. 1996). In determining whether a complaint fails to state a claim, the court may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which judicial notice may be taken. See St. Francis Xavier Parochial Sch., 117 F.3d at 624. Furthermore, the court must accept the plaintiff's factual allegations as true, and draw all reasonable inferences in favor of the plaintiff. Id.; see also Maljack Prods. v. Motion Picture Ass'n, 52 F.3d 373, 375 (D.C. Cir. 1995). However, the court need not accept as true the plaintiff's legal conclusions. See Taylor v. F.D.I.C., 132 F.3d 753, 762 (D.C. Cir. 1997).

The ADA requires that:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

The Rehabilitation Act provides, in pertinent part, that:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination [by] . . .
> . . .

(2)(A) a college, university, or other postsecondary institution . . .

29 U.S.C. § 794.

In order to establish a violation of either of these statutes, plaintiff must prove: (1) that she has a disability; (2) that she is otherwise qualified for the benefit in question; and (3) that she was excluded from the benefit due to discrimination solely on the basis of the disability. See Doe v. University of Maryland Medical System Corp., 50 F.3d 1261 n.9 (4th Cir. 1995)(citing Gates v. Rowland, 39 F.3d 1439, 1445 (9th Cir.1994)).

Courts are divided on the issue of whether ADHD is a disability under the ADA. Several courts have concluded that ADHD can constitute a disability under the ADA. See Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 155 (1st Cir. 1998); Axelrod v. Phillips Academy, Andover, 46 F. Supp.2d 72, 82 (D. Mass. 1999); Bingham v. Oregon School Activities Ass'n, 37 F. Supp.2d 1189, 1195 (D. Or. 1999). However, at least three courts have held that plaintiffs with ADHD did not have a disability under the ADA. See Price v. National Board of Medical Examiners, 966 F. Supp. 419, 428 (S.D. W.Va. 1997); Demar v. Car-Freshner Corp., 49 F. Supp.2d 84, 91 (N.D. N.Y. 1999); Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 505-06 (7th Cir. 1998). For the reasons set forth below, this Court need not resolve the threshold question of whether ADHD is a disability within the meaning of the ADA.

IV. DISCUSSION

A. Plaintiff Petitioned the Wrong Entity

Defendants argue that even assuming, arguendo, that plaintiff has a qualified disability, plaintiff's case should be dismissed because she has petitioned the wrong entity. Mem. in Supp. of Def.'s Mot.

at 11-13. This Court agrees.

It is the National Board of Medical Examiners (NBME) which administers all aspects of the USMLE. Specifically, it is the NBME, and not Howard University or its College of Medicine, which is responsible for determining whether a student should receive special accommodations while taking the exam. The fact that plaintiff has sued the wrong entity is evident upon review of a number of strikingly similar cases in which plaintiffs sought accommodation from the NBME, rather than the medical school in which they were enrolled. See Price v. National Bd. of Med. Examiners, 966 F. Supp. 419 (S.D. W.Va. 1997)(holding that three medical students diagnosed with ADHD and learning disabilities failed to show they were substantially limited in their ability to perform a major life activity as compared to most people in the general population, and thus, did not have a disability under the ADA, and were not entitled to any accommodation by the NBME for the USMLE); Gonzales v. National Bd. of Med. Examiners, 60 F. Supp.2d 703 (E.D. Mich. 1999)(holding that medical student's learning disabilities did not constitute substantial limitation of life activities of reading and learning); Doe v. National Bd. of Med. Examiners, 1999 WL 997141 (E.D. Pa. 1999)(NBME enjoined from noting accommodation on score of plaintiff with multiple sclerosis who NBME allowed accommodation while taking the USMLE). Each of these cases involved medical students with alleged disabilities who sought accommodation from the NBME, and the system the NBME has in place to determine whether a student's request for accommodation during the USMLE will be honored is discussed in each of these decisions.

In Doe v. National Bd. of Med. Examiners, the court specifically recognized that

> [t]he grant of a time-related accommodation is at the discretion of the

> NBME and is not given unless the Office of Test Accommodations of the NBME, after having the request for accommodations reviewed by an expert, determines that the requested accommodation is appropriate.

1999 WL 997141 at *8.

It is thus obvious that the NBME, and not Howard University or its College of Medicine, is the entity which determines who will receive accommodations while taking the USMLE, and that the NBME is the entity which administers the examination and implements the accommodations.

Section 309 of the ADA specifically covers "examinations and courses" and provides:

> Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

42 U.S.C. S 12189. The NBME is covered under this provision. See Doe, 1999 WL 997141 at *6.

Furthermore, contrary to the allegations of the plaintiff, Howard does not "sponsor" a student to take the USMLE; rather, a student must be enrolled in a medical school and have successfully completed her first two years in order to sit for the USMLE. This instant case involves a student who was dismissed for failing to pass the USMLE after her third attempt pursuant to school policy and is subsequently precluded from taking the exam as a Howard student, rather than any failure by either defendant to accommodate her for the exam.[2]

B. Defendants Had No Knowledge of Plaintiff's Alleged Disability

[2] Plaintiff does not allege that defendants applied the policy to her in a discriminatory fashion, or that they precluded her from taking the exam. Plaintiff remains free to apply to another medical school, and if admitted, to seek the appropriate accommodations from the NBME and re-take the USMLE.

Defendants argue that they do not have an obligation to accommodate plaintiff because they did not have knowledge of her condition prior to her dismissal from Howard. Defs.' Reply at 5-6. In addressing a different argument, plaintiff accuses defendants of "conveniently ignor[ing]" the timing of the diagnosis of her condition, and claims that "[i]n the present case plaintiff's condition had not been diagnosed at the time that she took the test. Accordingly, the disability existed at the time relevant for this complaint." Pl.'s Resp. at 2 (emphasis supplied). However, plaintiff's argument is contrary to the plain language of the Rehabilitation Act and the ADA.

Plaintiff states that after she failed the USMLE three times and was dismissed from the medical school she was diagnosed with ADHD and "then advised the defendants of her disability and requested that the College of Medicine sponsor her for the licensing examination again with appropriate accommodations for an individual with a disability." Compl. at ¶ 8 (emphasis added). The relevant time period for determination of what duty the statutes would have imposed upon defendants is from 1990, when plaintiff began her studies at Howard University, through her third attempt at the USMLE, prior to August, 1995. It is relevant that at no time during this period did plaintiff ever notify defendants of her disability or request any intervention by defendants in securing any accommodation for the USMLE. Indeed, in her complaint, she states that she sought no medical attention until October, 1995. Compl. at ¶ 7.

This Circuit has held in the employment context that both the Rehabilitation Act and the ADA prohibit only discriminatory acts performed "with an awareness of the disability itself and not merely an awareness of some deficiency in the plaintiff's performance that might be a product of an unknown disability." Crandall v. Paralyzed Veterans of America, 146 F.3d 894, 897 (D.C. Cir. 1998). The

Crandall court so holds because of the "perverse consequences" of dispensing with notice, such as plaintiffs securing post hoc disability diagnoses that encompass the conduct that led to the challenged action. 146 F.3d at 898. Neither the Rehabilitation Act nor the ADA require a defendant to accommodate a plaintiff for a disability of which the defendant had no notice of at the time of the challenged action. Assuming, arguendo, that plaintiff's ADHD is a disability within the meaning of the statutes and further, that defendants could have afforded plaintiff some accommodation in taking the USMLE, neither act would have required that defendants afford or facilitate such accommodation in the absence of any notice of plaintiff's disability; nor would either act require that defendants create a post hoc exception to their policy of dismissing a medical student who does not pass the USMLE after no more than three attempts.

Other courts have similarly held that schools only have an obligation to reasonably accommodate a student if they know or have reason to know of a student's disability. In Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791 (1st Cir. 1992), a former medical student who alleged cognitive disabilities diagnosed after his dismissal brought an action against the medical school under the Rehabilitation Act. The First Circuit upheld the trial court's grant of summary judgment for the school, holding "that for a medical school 'to be liable under the Rehabilitation Act, [it] must know or be reasonably expected to know of [a student's] handicap.'" Wynne v. Tufts Univ. Sch. of Med., 976 F.2d at 795 (quoting Nathanson v. Medical College of Pa., 926 F.2d 1368, 1381 (3d Cir. 1991)). The Court observed that

> [a] relevant aspect of this inquiry is whether the student ever put the medical school on notice of [her] handicap by making "a sufficiently direct and specific request for special accommodations."

Id. (citation omitted). Plaintiff, in her complaint, concedes that she did not do so. See Compl. at ¶¶ 6-8.

Similarly, in Gill v. Franklin Pierce Law Ctr., 899 F. Supp. 850 (D. N.H. 1995), a law student who claimed that he was disabled by Post Traumatic Stress Disorder brought an action against his law school under the Rehabilitation Act for dismissing him as a student and then denying his application for readmission. The Gill court held that the law school could not have violated the Rehabilitation Act because it did not know, nor have reason to know, that the student had a disability when he was dismissed.

Like the defendants in Crandall, Wynne, and Gill, defendants in the instant action cannot be found to have violated the ADA or the Rehabilitation Act for failing to grant an accommodation to plaintiff based on an alleged disability of which it had no knowledge, nor any reason to know, while plaintiff was enrolled in the College of Medicine. While it is true that the defendants had knowledge of plaintiff's alleged disability at the time she sought readmission to the College of Medicine, any decision to readmit her would have been a post hoc exception to Howard's policy of dismissing students who failed the USMLE three times, rather than an "accommodation" for a student enrolled in the medical school.

Plaintiff sought to be readmitted to the university only after she failed the USMLE three times and was dismissed from Howard pursuant to university policy. Although it is unfortunate that plaintiff's disability was not diagnosed before she took the USMLE, neither the Rehabilitation Act, nor the ADA, requires a university to reconsider a decision to dismiss a student for failure to pass a licensing examination in the number of times allowed by the school because the student is later diagnosed with a disability. The District of Columbia Court of Appeals has recently recognized that "a judgment by a

school official that a student has not performed adequately to meet the school's academic standards is a determination that usually calls for judicial deference." Alden v. Georgetown Univ., 734 A.2d 1103, 1108 (D.C. 1999)(citing Kraft v. W. Alanson White Psychiatric Found., 498 A.2d 1145, 1149 (D.C. 1985).

In sum, plaintiff fails to state a claim against defendants because plaintiff, in her complaint, acknowledges that defendants had no notice of her alleged disability prior to her dismissal, and the defendants cannot now be forced to re-admit plaintiff as a post hoc accommodation for an alleged disability discovered only after she was dismissed pursuant to a school policy based on academic requirements.

V. CONCLUSION

For the foregoing reasons, the undersigned finds that defendants have shown beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. Accordingly, the instant case will be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

It is, therefore this _____ day of December, 1999,

ORDERED that Defendant Howard University's Motion to Dismiss or in the Alternative Motion for Summary Judgment (Docket No. 25) is **GRANTED IN PART**, and that this action is **DISMISSED WITH PREJUDICE** pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

DEBORAH A. ROBINSON
United States Magistrate Judge